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No. 03-1715

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

JAMES A. LEWIS, dba B&H VENDORS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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RULE 29.6 STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents' brief in opposition does not and cannot refute the basic reasons why this Court should grant certiorari to review the unprecedented majority ruling of the court of appeals in this case.

Contrary to this Court's repeated admonitions that the Robinison-Patman Act must be narrowly construed, the majority below held *as a matter of law* that indirect purchasers may sue under Robinson-Patman sections 2(d) and (e), 15 U.S.C. § 13(d)-(e), to challenge benefits provided by a supplier to other indirect purchasers. No other court has ever so held, and with good reason. The ruling below creates a misguided legal precedent squarely in conflict with *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), which defined the outer limits of the application of section 2(d) to indirect purchasers. The ruling below also conflicts with the rulings of other circuits on indirect-purchaser standing under Robinson-Patman, including cases involving section 2(d) as well as those involving section 2(a). The Sixth Circuit's overbroad interpretation of the Robinson-Patman Act in this case has already provoked new lawsuits involving hundreds of indirect-buying plaintiffs. (Pet. at 24 n 14.) If left standing, the decision will impose practical and economically unjustified burdens on businesses of the sort this Court warned against in requiring the lower courts to avoid expanding the Robinson-Patman Act so as to "conflict with the purposes of other antitrust legislation." *Automatic Canteen Co. of Am. v. FTC*, 346 U.S. 61, 63 (1953).

1. ***The Decision Below Directly Conflicts Fred Meyer.*** Plaintiffs' attempt to reconcile the decision below with *Fred Meyer* is futile. This Court's holding in *Fred Meyer* was unambiguous: "We hold *only* that, when a supplier gives allowances to a *direct-buying* retailer, he also must make them available on comparable terms to those who buy his products through wholesalers and *compete with the direct buyer* in resales." 390 U.S. at 358 (emphasis added). The decision below is flatly inconsistent with *Fred Meyer*: the court of appeals granted standing to *indirect-buying* retailers who were challenging benefits given to other *indirect-buying* retailers.

Plaintiffs' effort to defend the court of appeals' ruling reflects a profound misunderstanding of *Fred Meyer.* Plaintiffs ignore the actual holding in *Fred Meyer* and assert that "[u]nder the ruling in *Fred Meyer*, a supplier such as Philip Morris is required by Section 2(d) of the Act to make available proportionate benefits to *all* competing customers, *whether they purchase directly or through an intermediary wholesaler.*" (Opp. at 7 (emphasis added).) *Fred Meyer* said no such thing. On the contrary, this Court's holding, quoted above, is explicitly limited to the situation "when a supplier gives allowances to a direct-buying retailer" 390 U.S. at 358. Neither *Fred Meyer,* nor any judicial interpretation of *Fred Meyer*, remotely supports plaintiffs' belief that *Fred Meyer* construed the Robinson-Patman Act to apply to *all* customers, "whether they purchase directly or through an intermediary wholesaler."

Moreover, *Fred Meyer* itself lies at the outermost fringes of this Court's precedents regarding the rights of indirect purchasers to invoke the antitrust laws. In the years since *Fred Meyer* was decided, this Court has consistently declined

to extend the protection of the antitrust laws to "indirect" plaintiffs. *E.g., Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (denying standing to indirect purchasers under the Sherman Act). There is no basis in sound antitrust policy or in the decisions of this Court to condone the court of appeals' unprecedented expansion of *Fred Meyer*.

2. *The Court of Appeals' Decision Cannot be Harmonized with Decisions by Other Courts of Appeal.* Faced with the fact that other circuits have repeatedly interpreted the Robinson-Patman Act more narrowly than the court of appeals below, plaintiffs argue that such inconsistent case law is irrelevant, because the cases in other circuits supposedly involved claims of price discrimination under Section 2(a) of the Act, rather than discrimination in promotional benefits under Section 2(d). (Opp. at 11.)

Once again, plaintiffs' argument rests on an erroneous premise. A number of the conflicting Robinson-Patman standing cases in other circuits deal with discriminatory benefits under Section 2(d). *See, e.g., Labrador, Inc. v. IAMS Co.*, 1997-1 Trade Cas. (CCH) ¶ 71,740, No. 95-56581, 1997 WL 8450 (9th Cir. 1997) (table decision) (*Fred Meyer* does not confer standing upon indirect plaintiff to challenge preferential services and incentives); *Am. News Co. v. FTC*, 300 F.2d 104, 109 (2d Cir. 1962) (Section 2(d) does not apply to indirect purchasers unless seller controls intermediate distributor). Indeed, in *Fred Meyer* itself, this Court cited case law involving "§ 2(d) liability" where the seller controlled the terms of sale by dummy wholesalers to indirect customers. *See* 390 U.S. at 353.

In any event, regardless of whether cases address Section 2(a) or Section 2(d), the expansive approach to indirect-

purchaser standing adopted by the court below cannot be harmonized with the narrower approach to Robinson-Patman standing taken by other circuits, in keeping with this Court's guidance. The generally recognized rule that indirect purchasers lack standing, which is subject only to narrow exceptions not applicable here, derives from the basic Robinson-Patman requirement that the potentially actionable discrimination must be that of a "single seller." *See FTC v. Morton Salt Co.*, 334 U.S. 37, 45 (1948). This doctrine applies equally to 2(d) and 2(a) cases. *See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft*, 19 F.3d 745, 748-49, 752 (1st Cir. 1994) (Breyer, J.). By granting standing to "indirect purchasers," the court below has flouted this Court's holding in *Fred Meyer*, expanded the reach of an often anticompetitive statute, and upset long-settled standing doctrines applicable to indirect purchasers. Plaintiffs' contention that Philip Morris is asking this Court to engage in a "reassessment of the functional interpretation of standing" (Opp. at 12) is nonsense. A reversal of the court below will restore and reaffirm accepted principles of antitrust standing.

3. *The Conflict Created by the Court Below Involves a Legal Issue of Statutory Interpretation, Not an Issue of Fact.* The conflict between *Fred Meyer* and the decision below involves a pure issue of statutory interpretation: namely, whether *indirect* customers may sue under the Robinson-Patman Act alleging that preferential benefits were given to other *indirect* customers. This conflict will not be affected by any trial of the substantive claims in the case.[1]

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1. The court of appeals' order regarding standing under *Fred Meyer* is a final order, and the fact that some claims in the case have been remanded for trial is, of course, no impediment to a grant

(Cont'd)

Accordingly, plaintiffs' contention that there was evidence in the record that Philip Morris sold directly to a few retailers is a red herring. Philip Morris has never denied that it sells directly to *some* retailers – but such direct sales are not at issue here. At issue here is the court of appeals' ruling that *Fred Meyer* allows *indirect-buying* retailers to sue under Section 2(d) even when they compete against *other indirect-buying* retailers. *See* App. 24a (Philip Morris' direct contacts with retailers were "not sufficient to bring this case within the *Fred Meyer* analysis"); App. 41a (acknowledging that in contrast to *Fred Meyer*, "[h]ere, of course, the favored purchasers . . . [are] stores purchasing instead through a wholesaler").

4. ***Philip Morris' Provision of Promotional Benefits to Indirect-Buying Retailers Is Not Equivalent to Direct "Sales" to Such Retailers.*** Plaintiffs argue that the "unlawful behavior" in this case was Philip Morris' provision of promotional benefits to retailers, and therefore Philip Morris should be deemed to have a "direct" relationship with every retailer to whom it provided such benefits (even if that retailer purchased Philip Morris cigarettes indirectly through an independent wholesaler). (Opp. at 7-8.) This approach – which no other court has ever adopted – was suggested by Judge Moore as an answer to Judge Rogers' more straightforward reading of *Fred Meyer*. (App. at 42a.) This transparent effort to sidestep the conflict with

(Cont'd)
of certiorari. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 98 (1976) (granting certiorari in case remanded by court of appeals); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945) (certiorari is appropriate to review issues decided by court of appeals in remanding case for trial); 28 U.S.C. § 1254(1) (certiorari may be granted to review claims "before or after rendition of judgment or decree").

Fred Meyer cannot withstand analysis; indeed, if this mode of analysis were adopted, it would cause the decision below to conflict with the longstanding rule that the Robinson-Patman Act *does not apply at all* where a seller "refuses to deal" with a prospective customer.

Specifically, plaintiffs offer the following sleight of hand. If the term "direct-buying" retailer were construed to include retailers who did not *buy* goods directly from a seller, but who did receive promotional benefits directly from that seller, then "indirect" retailers (who buy cigarettes from middlemen) that received promotional benefits from Philip Morris in this case could be deemed to be "direct-buying" customers. According to plaintiffs' theory, once these indirect retailers (who receive promotional benefits) are deemed to be "direct-buying" customers, the facts of this case fit within the parameters of *Fred Meyer* – namely, indirect customers complaining about preferences granted to direct customers. (Opp. at 8.)

However, there is a fatal flaw in this analysis. Any such re-definition of "direct" and "indirect" customers runs headlong into longstanding precedent regarding the inapplicability of the Robinson-Patman Act to "refusals" to deal with a customer. Specifically, it is well-established that the Act only applies to discrimination between customers who actually *purchase* goods from a seller; the Act does not apply at all to a seller's decision to deal with one customer and to *refuse* to deal with a competing customer. *See, e.g.*, 15 U.S.C. § 13(a) ("[N]othing herein contained shall prevent persons . . . from selecting their own customers. . . ."); *L&L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1120 (5th Cir. 1982) (refusal to deal is not within scope of Robinson-Patman Act). Accordingly, if the term "direct customer" is defined as anyone who receives promotional

benefits directly from Philip Morris (rather than anyone who *buys* goods directly from Philip Morris), then Philip Morris has simply "refused to deal" with the plaintiffs by refusing to give them these promotional benefits. Of course, this "refusal to deal" would not be actionable under any section of the Robinson-Patman Act.

In short, far from reconciling the court's holding with *Fred Meyer*, any strained focus on "direct" receipt of promotional benefits (rather than on "direct" sales of goods) creates an even more fundamental conflict with Robinson-Patman precedent.

5. *Plaintiffs' Reliance Upon FTC Advisory Guidelines is Misplaced.* Lacking any judicial support for the court of appeals' ruling, plaintiffs point to the Federal Trade Commission's advisory guidelines, "Guides for Advertising Allowances and Other Merchandising Payment and Services," 16 C.F.R. § 240, to buttress their argument that *Fred Meyer* should be construed to protect all indirect purchasers, not just those indirect purchasers who compete against direct-buying customers. (Opp. at 8-10, 13.) The FTC Guides, however, expressly state that they "do not have the force of law," 16 C.F.R. § 240.1, and they do not purport to draw the line between conduct that is legal and conduct that is illegal under the Act.

Rather, the FTC Guides merely create a safe harbor for businesses, by advising them of ways to steer clear of any potential entanglements with the vagaries of Robinson-Patman's prohibitions. In short, the FTC Guides offer businesses a conservative code of conduct, designed to avoid any legal risk, irrespective of the circumstances. To our knowledge, no court has ever suggested that the wide berth

that the FTC Guides give to the Act should constitute an absolute requirement of law. Respondents have cited no complaint filed by the FTC advancing any such view of the law, and we are not aware of any such complaint.

It would be fundamentally unsound policy to convert the safe harbor created by the advisory FTC Guides into a categorical legal interpretation of the prohibitions of the Robinson-Patman Act. To do so would severely constrain the ability of businesses to engage in efficiency-enhancing distribution models that may not fall within the FTC's safe harbor, but that nevertheless are pro-consumer and comport with this Court's precedents. That certainly could not have been the goal of the FTC in promulgating these Guides.

6. Interpretation of the Robinson-Patman Act is Within the Domain of this Court, Not Congress. In plaintiffs' view, Philip Morris' claim that the decision below "impermissibly expands the reach of the [Robinson-Patman] Act" is premised upon "a selective reading of contemporary economists who theorize that the Act no longer serves a competitive purpose." (Opp. at 10.) Plaintiffs misread both Philip Morris' petition and this Court's precedents.

It is certainly true that many economists – along with the Department of Justice, leading antitrust treatises, and numerous lower courts – have criticized the Robinson-Patman Act as furthering anticompetitive goals; but Philip Morris' petition is based on the precedents of *this Court*, not on economic literature. This Court has consistently warned lower courts that the Robinson-Patman Act should be cautiously applied, so as not to hinder the broader competitive

goals of this nation's antitrust laws. *See, e.g., Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979) (Robinson-Patman Act should be "construed consistently with broader policies of the antitrust laws"); *Automatic Canteen*, 346 U.S. at 63 (Act should be narrowly construed so as not to "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"). By expanding the reach of the Act far beyond *Fred Meyer* or any other judicial precedents, the court of appeals has flouted this Court's admonitions.

Plaintiffs' contention that Philip Morris should raise its concerns over the court of appeal's ruling with Congress, rather than this Court, is frivolous. No issue raised in this petition for certiorari falls within the domain of Congress. The court of appeals erroneously expanded the scope of the Act – in direct conflict with this Court's holding in *Fred Meyer* and in conflict with the Robinson-Patman Act standing rules followed in other circuits. It is up to this Court to correct that serious error.

CONCLUSION

For the reasons set forth herein, Petitioner Philip Morris respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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